NO. 21598

United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 21598

JULIUS CHRIS FISHERMAN,

Appellant,

vs.

WALTER D. ACHUFF, etc.,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

The Appellant is presently held in the custody of the Respondent pursuant to two commitments from the Superior Court of the County of Los Angeles, State of California. The first one was a conviction of Penal Code §459 (Burglary of the Second Degree) hereinafter referred to as BURGLARY CONVICTION for which he was sentenced to State Prison for the term prescribed by law in 1956. The second commitment arose out of a plea of guilty entered to Health and Safety Code §11501 (Sell, furnish or give away a narcotic drug) hereinafter referred to as NARCOTIC CONVICTION on May 17, 1960. (Record p. 2)

An appeal was taken from the imposition of judgment pronounced on July 31, 1964 in the NARCOTIC CONVICTION. The Court of Appeal of the State of California, Second Appellate District, affirmed said judgment on September 30, 1965. denying a petition for re-hearing. A Petition for a Hearing was subsequently denied by the Supreme Court of the State of California. The opinion of the Court of Appeal is reported in 237 Cal. App. 2d 356. After duly applying to the Courts of the State of California for collateral relief which was not granted, a Petition for Writ of Habeas Corpus was filed in the United States District Court pursuant to 28 U.S.C. §2254. The writ was issued and after oral argument upon the issues set forth therein said petition was denied. (Record p. 29) On January 3, 1967 the Honorable Leon R. Yankwich

issued a Certificate of Probable Cause certifying that the appeal sought to be taken from the order denying relief was taken in good faith in accordance with 28 U.S.C. §2253. (Record p. 31)

STATEMENT OF FACTS

The facts of the instant case, for the purpose of appeal, are set forth in the following paragraphs:

On May 17, 1960, a plea of guilty was entered to the second count of the amended information - Health and Safety Code--the NARCOTIC CONVICTION. On June 20, 1960, attorney for Appellant made a motion for withdrawal of the plea of guilty previously entered. There was never any ruling on this motion. At this point the Judge called for a discussion at the bench with Counsel. The judge then indicated his intention to provide hospitalization. On that premise attorney for the defendant allowed the sentencing procedure to continue. The court then made such an order. (Record p.5)

The order of the Court was entered committing appellant to the State Department of Mental Hygiene pursuant to California Welfare and Institutions Code Section 5355. Previous to this order a State Psychiatrist was appointed to examine defendant pursuant to Section 5355 of the W. & I. Code. The psychiatrist's report to the Court was prepared and headed under this section, the bill authorizing the payment and the voucher were made out pursuant to this section

and signed by the Judge. The probation report discussed commitment under this section and was read and initialed by the Judge. All parties, the District Attorney, the Court, the Probation Officer, the Psychiatrist, Counsel for the defendant and the Defendant were proceeding pursuant to this section from May 17, 1960, at plea, through commitment to the State Hospital at Atascadero, under the order for not less than Three Months nor for more than Two Years and subsequent discharge therefrom on December 9, 1960, and up to February 6, 1961, when the Court issued its bench warrant. On February 9, 1961, appellant with counsel answered the bench warrant at which time an order was made changing the order of June 20, 1960, (Nunc Pro Tunc) by striking the words "Section 5355 of the Welfare and Institutions Code" and adding the words "Section 5360 of the Welfare and Institutions Code". The Court claiming that inadvertant error had reconferred jurisdiction for the Nunc Pro Tunc Order. (Record p.6)

Previously, appellant had been sent to prison in 1956 BURGLARY CONVICTION. He was paroled in 1959, his sentence being fixed at Five Years--Two and one-half Years in custody and Two and One-Half Years on parole. Upon being discharged from the Hospital appellant was picked up at home by his parole agent for violation of parole. The violation alleged was the plea of "guilty" in court to the NARCOTICS CONVICTION. His parole and discharge date were extended by Adult Authority Action on December 16, 1960, for a period of time of Six-

Months-the period of time from the guilty plea to discharge from the Hospital.

On June 28, 1961, appellant entered Ingleside Lodge Sanitarium under orders of his psychiatrist. The parole officer was notified of this by appellant's sister the following morning. An equivocal nalline test had a psychologically disturbing effect, resulting in a decision by appellant and his psychiatrist that daily intensive therapy in a clinical atmosphere might overcome his anxieties and depressions. He had taken no medication until this date and none was prescribed in his treatment. The parole officer arrived at the sanitarium the next day and appellant explained that he was there to receive intensive therapy. He also informed the parole officer that he had taken 4 pain relievers - a medication called Darvon - for pain caused by loss of a temporary tooth filling.

At this point the parole officer ordered appellant to check out of the sanitarium without consulting appellant's psychiatrist or the doctor in charge of the sanitarium, saying he was going to lodge appellant in jail pending the outcome of the scheduled court action on July 28, 1961. When appellant refused to do so without his psychiatrist's consent the parole officer attempted to put handcuffs on him. Appellant started to run but slipped and fell after which he was taken to County Jail. On August 25, 1961, the Judge after ordering a supplemental psychiatric examination reviewed

the narcotic conviction case in addition to the reasons why appellant was in the County Jail pending parole violation. He thereupon placed appellant on probation for a Five Year Period and Ordered his Release. This order/sentence was for the same case appellant had been unqualifiedly discharged from Atascadero on December 9, 1960. Appellant was not released; and on September 6, 1961, he was returned to prison with two violationscharges confronting him at the parole violator's board in addition to the charge that he plead guilty in case number 226243. (Record p. 7)

The first two charges were:

1. Using Narcotics. (Darvon is not a narcotic)

2. Attempting to escape from a parole agent.

At the parole violator's hearing appellant pleaded not guilty to charges 1 and 2 and guilty to charge 3. The certification of the hearing incorrectly states that appellant pleaded guilty to all 3 charges.

On October 13, 1961, the Court, without defendant and/or his counsel being present, upon learning that appellant had been returned to prison, revoked probation and without arraignment for judgment sentenced appellant to State Prison as the law prescribes. The commitment being received at the Prison by mail on November 1, 1961.

On March 1, 1962, the Court being convinced that it had acted contrary to appellant's rights under the Sixth Amendment cnacelled its previous order sentencing appellant

to prison using as precedent the decision of In re KLEIN, 197 Cal. App. 2d 58, and reinstated probation. This order became effective on May 4, 1962, when the institution received notification from the Court of its action.

On March 3, 1960, a complaint was filed charging defendant with possession of Heroin (Calif. Health and Safety Code Section 11500). On March 18, 1960, defendant was held to answer the charge. On April 26, 1960, the day initially set for trial, the information (#226243) was amended to add a new, more onerous different count to the information--Count Two-Sale of Heroin (Calif. Health and Safety Code Section 11,501) NARCOTIC CONVICTION. (Record p. 8)

On July 31, 1964, after appellant had once again been placed on parole, he was brought back to court for probation violation. His counsel at that time, PAUL AUGUSTINE, said:

> "I have read that (probation) report and discussed this matter with the defendant but I am inclined to think that the Court has no alternative but to sentence him to State Prison..."

(Record p. 9)

SPECIFICATION OF ERROR

(1) The court was required to conduct a full evidenciary hearing to establish the existence of the allegations set forth in the petition.

(2) In proceeding to pronounce sentence upon appellant after the motion to withdraw the plea of guilty had been made without ruling thereon the court in effect extended a benefit in consideration of the retention of said plea.

(3) The judgments and orders of a Court as it purports to act with respect to an individual without in fact having jurisdiction over the person are null and void.

(4) When there are repetitive prosecutions and punishments for a single offense, such conduct will be prohibited by the due process clause of the fourteenth amendment.

(5) The imposition of punishment and penal confinement after a course of treatment had been decreed and successfully completed was cruel and unusual punishment as proscribed by the eighth amendment.

(6) The violation of the parole of appellant was predicated upon falsified data violating all standards of due process.

(7) The appellant was deprived of the effective representation of counsel at the time of imposition of sentence in 1964.

(8) The amendment of the information to charge an offense not shown to exist either by information or indictment at the time of arraignment in Superior Court was in derogation of appellants constitutional rights.

ARGUMENT

I

THE COURT WAS REQUIRED TO CONDUCT A FULL EVIDENCIARY HEARING TO ESTABLISH THE EXISTENCE OF THE FACTS SET FORTH IN THE ALLEGATIONS IN THE PETITION.

In Townsend vs. Sain, 372 U.S. 293 (317), the Courts said: "If, for any reason not attributable to the inexcusable neglect of petitioner evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."

In Trusty vs. Oklahome, 360 Fed. 2d 173 (175), where the petitioner set forth facts alleging an unlawful search and seizure, the court held that he was not entitled to an evidenciary hearing as these matters were fully considered at the time of trial when the states witness gave testimony that was not contradicted at that time.

In Carroll vs. Turner, 262 F. Supp. 486, the court held that where the federal habeas corpus petition set forth facts indicating the sentence was void and subject to collateral attack an evidenciary hearing must be held where he had

to recieve a full and fair evidenciary hearing on this point in the state court at the time of trial or in a collateral proceeding where the facts set forth were in dispute.

In Randel vs. Beto, 354 Fed. 2d 496, the court held that where there was a question as to whether or not the petitioner had vaived his right to a jury trial an evidenciary hearing should be granted to determine whether such a waiver did in fact occur.

In Fortner vs. Balkeom (Fifth Circuit 7/7/67) the court said that where substantial constitutional questions are presented which are unrefuted, the Court should duly consider their validity and not dispose of the petition inaa perfunctory manner.

In the instant case, each one of the irregularities set forth occurred subsequent to the initial entry of the plea to the offense charged. Each ground set forth in itself indicates an indèpendant violation of the constitutional rights of the appellant. The conflict that exists between the allegations which are a part of the petition and the contentions of the respondent are illustrated in the "Order" prepared by the respondent and executed by the District Judge. As a provision thereof it states that "the petition states no meritorious reason" for relief to be granted to the petitioner. (Record p. 30, lns. 30-31) In contradistinction to the other provisions of the order which deny relief to the appellant "as a matter of law", this part-

icular conclusion must therefore be a denial of the existence of the facts as alleged in the petition. A hearing should have been granted for a full consideration of all of the issues presented.

The court in failing to agree to an evidenciary hearing prevented the appellant from proving the allegations in the petition and thereby securing the relief prayed for therein.

II

IN PROCEEDING TO PRONOUNCE SENTENCE UPON APPELLANT AFTER THE MOTION TO WITHDRAW THE PLEA OF GUILTY HAD BEEN MADE WITHOUT RULING THEREON THE COURT IN EFFECT EXTENDED A BENEFIT IN CONSIDERATION OF THE RETENTION OF SAID PLEA.

In Waley vs. Johnson, 316 U.S. 101 (106), the court said "...for a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession".

In Cicenia vs. La Gay, 357 U.S. 504, the court held that the Federal District Court had the power to inquire into the voluntariness of a confession in a habeas corpus proceeding.

In Shotwell Manufacturing Company vs. United States, 371 U.S. 341 (374) the court said:

" ..confessions are equally involuntary whether obtained by hope or fear..." (emphasis added)

In Fay vs. Noia, 372 U.S. 391 (410), the lower federal courts do not " ..hesitate to discharge state prisoners whose convictions rested on unconstitutional statutes or had otherwise been obtained in derogation of constitutional rights".

In Machibroda vs. United States, 368 U.S. 487 (493), the court said:

"A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack."

In Gilmore vs. California, 364 F 2nd 916, where the defendant pleaded guilty and there were allegations of misrepresentations as to what the penalty for the offense might be, the court held that the Petitioner was entitled to a hearing to determine if in fact there had been such misrepresentations.

In Doran vs. Wilson, 369 F. 2d 505, the court held that while a plea of guilty will constitute a waiver of all nonconstitutional defenses the effect of a constitutional deprivation must be taken into consideration in the retention of the plea of guilty and said plea must not be the product of a violation of fundamental constitutional rights. If he was so motivated by these occurances or by "his own knowledge of his guilt and the desire to take his medicine"

is the crucial question which should have been decided.

Here the appellant made a motion to withdraw his plea of guilty prior to the initial imposition of sentence in June 1960. In consideration of appellants forebearing to insist upon the withdrawal of said plea which should have been given liberal consideration prior to the entry of judgment, the court conferred "hospitalization" in lieu of a penal commitment. This in effect amounted to a "benefit" which in effect compromised the free and voluntary character which should in fact be the essence of a plea of guilty. The utilization of this inducement makes the plea of guilty no more lawful than the obtaining of a confession and/or a plea of guilty through other unlawful means.

With the representation having been made that "hospitalization"would be the only penalty" which he would be subjected to the appellant would be entitled to relief if there was in fact a misrepresentation which induced him to retain the plea that he entered in the first instance. If at the time of the hearing that is required herein it is shown that the motivation for the action of the appellant with respect to his plea was predicated upon the grant of "hospitalization" and not upon his guilt of the charges set forth in the information, then the free and voluntary character of the plea is thereby compromised.

III

THE JUDGMENTS AND ORDERS OF A COURT AS IT PURPORTS TO ACT WITH RESPECT TO AN INDIVIDUAL WITHOUT IN FACT HAVING JURISDICTION OVER THE PERSON ARE NULL AND VOID.

In Ex Parte Stricker, 109 F 145, the court held that there must not only be a tribunal competent to act, but, where an action of the court involves the personal liberty of the defendant, he must, except in cases of actual contempts committed in the presence of the court, be brought within the jurisdiction of the court.

In Anderson vs. Anderson, 215 N.Y.S. 2nd 155, the court held that the rendition or enforcement of personal judgment against a defendant over whom the state has no jurisdiction involves a violation of due process.

In Lankton vs. Superior Court, 5 Cal. 2d 694, the Court said "If the Court misconstrued the evidence before it or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical which could therefore be corrected by the Court on its own motion".

In Key System Transit Co. vs. Superior Court, 36 Cal. 2d 184, the court stated: "Trial Court has jurisdiction to correct mistakes in its orders and records, if such mistakes are not actually the result of exercise of judgment, but where the error is inherently judicial rather than clerical

or inadvertant the Court has no power to amend its decision."

In Bruce vs. Bruce, 296 P2nd 310, the court said: "A judgment or decree Nunc Pro Func may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." (emphasis added)

In Siegal vs. Superior Court, 251 A.C.A. 555 (559), the court held that the function of a nunc pro tunc order in causing an order to be entered now for an order previously made is to make its records conform to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never, in fact, given.

The court in originally committing appellant to Atascadero acted pursuant to the provisions of 5355 of the Welfare and Institutions Code. The commitment of the court was under that section, the appointment of the psychiatrist and the preparation of his report were pursuant to that section. The billing statement and the payment thereof were made under the same code section. No probationary sentence was ever imposed. These steps having taken place, there was no clerical error that could have been corrected. The intent of the court to bring about this result is evidenced by the consistancy of his aforementioned actions. If the court intended something else, this would be judicial error and could not be corrected by a nunc pro tunc order.

When appellant was subsequently discharged from

Atascadero having fulfilled the order of the Court as set forth in the judgment, the court no longer had any connection or contacts with defendant to act with respect to him. To bring him into court, without jurisdiction, and purport to make orders of an illegal character is a nullity and therefore a denial of due process.

When the court in August 1961, purported to impose a probationary sentence pursuant to this invalid order this similarly was a denial of procedural due process.

When the court attempted to once again impose probation on March 1, 1962 after appellant had been sentenced to state prison some five months before it was acting in excess of its jurisdiction inasmuch as such an order can be made only within thirty days after court has notice of the execution of the judgment. In making the new order there is nothing in it to indicate that he just obtained this knowledge. To the contrary, it was pronounced because the court realized that it had deprived appellant of another essential constitutional right--the right to counsel. (California Penal Code 1203.2)

IV

WHEN THERE ARE REPETITIVE PROSECUTIONS AND PUNISHMENTS FOR A SINGLE OFFENSE, SUCH CONDUCT WILL BE PROHIBITED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The court in United States ex rel Hetendyi vs. Wilkins,

348 F2d 844 (849), the court "...held that double jeopardy is a fundamental right within the doctrine of selective incorporation and this guarantee of the Bill of Rights is thus made applicable to the states thereby."

In Norkett vs. Stallings, 251 F. Supp. 662, (665), the court held that where there is a situation of multiple prosecutions that is shocking to the conscience, "the Fourteenth Amendment then may operate to extend to the states the privileges accorded by the Fifth Amendment, in order to preserve those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions'".

In Barnett vs. Gladden, 375 F 2d 255, the court held that apart from the Double Jeopardy Clause of the Fifth Amendment, the Due Process clause of the Fourteenth Amendment "standing alone, imposes some limitations on a state's power to prosecute an individual who has previously been prosecuted for the same offense"

In this case appellant was in effect "sentenced" three times on his narcotic conviction case. Double punishment does of necessity come within the purview of double jeopardy as it is in fact the offspring of double jeopardy.

Appellant was initially "sentenced" to a term of confinement at Atascadero, no period of probation being imposed. He was thereafter given a certificate of discharge therefrom.

In August of 1961, the court long since having lost

jurisdiction to act with respect to the appellant purported on this to impose a probationary status on the same NARCOTIC CONVICTION which he had been discharged from the hospital after being treated successfully.

In March of 1962, after a commitment to state prison on this same conviction, the Court again having lost jurisdiction as provided in Penal Code 1203.2 again attempted to impose another probationary term on this same NARCOTIC CONVICTION.

When appellant was discharged from the hospital, a determination was made by the California Adult Authority after a hearing with respect to the NARCOTIC CONVICTION. It was decided that APPELLANT'S discharge date from his burglary conviction would be extended for six months. This occured in December of 1960.

When appellant was returned to prison, in September of 1961, at another hearing by the Adult Authority this same NARCOTIC CONVICTION was used as a basis for violating his parole.

The cumulative use of one conviction to sentence appellant several times, on the one hand and the compounded use of the NARCOTIC CONVICTION to violate his parole when said incident had already been administratively adjudicated on the other would certainly necessitate bringing into play the due process clause of the Fourteenth Amendment to afford him the necessary protection.

V

THE IMPOSITION OF PUNISHMENT AND PENAL CONFINEMENT AFTER A COURSE OF TREATMENT HAD BEEN DECREED AND SUCCESSFULLY COMPLETED WAS CRUEL AND UNUSUAL PUNISHMENT AS PROSCRIBED BY THE EIGHTH AMENDMENT.

In United States vs. Freeman, 357 F 2d 606, the court held that there may not be criminal responsibility for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

In United States vs. Sheller, 369 F 2d 293, where there was a violation of the Internal Revenue Code through failure to report the full extent of amounts earned by a lawyer, the court held that the fact that he was under the care of a psychiatrist at the time of the occurrance required a reconsideration of the case to determine if he lacked the requisite specific intent to establish criminal responsibility.

In Robinson vs. California, 370 U.S. 660, the court in reference to narcotics use held that to make a criminal offense of such a disease would be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In this case while a plea of guilty was entered, extensive psychiatric reports were prepared after a thorough

review of the background and the mental condition of the appellant at the time of the occurence of the particular offense. On the basis of these reports, the judge determined that appellants mental status was such that he required hospitalization. Appellant was accepted by the director of the hospital and treated for his narcotic addiction. He was discharged subsequently when his progress at the institution appeared to be satisfactory.

To at a later date impose punishment when there probably was no criminal responsibility at the time of the offense and when there was a previous finding of an underlying illness of addiction to narcotics would be cruel and unusual punishment proscribed by the Eighth and Fourteenth Amendments.

VI

THE VIOLATION OF THE PAROLE OF APPELLANT WAS PREDICATED UPON FALSIFIED DATA VIOLATING ALL STANDARDS OF DUE PROCESS.

In Moore vs. Gardner, 250 F. Supp 865, the Court held that all persons before administrative tribunals are entitled to administrative due process, and a decision must be fairly grounded upon the evidence and upon reason.

In Swift and Company vs. United States, 308 F. 2d 849, the Court held due process in an administrative hearing includes a fair trial, conducted in accordance principals of fair play and applicable procedural standards established by law.

In Russell-Newman Mfg. Co. vs. F. L. R. B., 370 F2d 980 (1984), the court said that in administrative proceedings of a quasi-judicial character the liberty and property of citizens must be protected by a fair and open hearing, that such a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and meet their claims. (emphasis added)

In Lechich vs. Rinaldi, 246 F. Supp. 675, the court said the suppresion of any part of the record by administrative agency is a derogation of procedural due process.

In this case, appellant was returned to prison on the NARCOTICS CONVICTION and in violation of his parole for burglary. He was charged with three violations: The NARCOTIC CONVICTION, attempted to escape from a parole officer and possession of Darvon-a dangerous drug. He was not allowed to have counsel at this proceeding. No record or transcription was made of the proceeding itself. The triers of fact were persons who were his accusers. While appellant pleaded "guilty" to the NARCOTIC CONVICTION, previously discussed, he pleaded "not guilty" to the other two charges, No competent evidence was presented at the "hearing" which lasted but a few minutes. Subsequently appellant was notified that he had pleaded "guilty" to all three charges.

It is quite clear that there was in this instance, no attempt whatsoever to have an impartial inquiry, as to whether

appellant had perpetrated any violation of his conditions of parole. The proceeding was completely devoid of the procedural safeguards which have come into being that are acknowledged to assure the rendition of a result that is factually substantiated by some competent evidence. Not even the most rudimentary protections were accorded him. As the result of the "findings" of this hearing, appellants date of discharge already fixed was annuled and reset at the maximum under the indeterminate sentence law.

VII

THE APPELLANT WAS DEPRIVED OF THE EFFECTIVE REPRESENTATION OF COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE IN 1964.

In Lunce vs. Overlade, 244, F 2d 68 (111), the Court held that there was ineffective representation by counsel when the attorney is "so lacking in diligence and competence that the accused isjwithout representation and the (trial) is reduced to a sham."

In Thomaston vs. Gladden, 326 F2nd 305 (307), the court held that one is entitled to a hearing after a plea of guilty to determine if "his representation by his own retained counsel may have been so ineffective as to amount to a denial of due process".

In Turner vs. Maryland, 303 F. 2d 507 (511), the court said that requirement of effective counsel is not satisfied if the lawyer "makes merely a perfunctory appearance and does

nothing whatsoever before or during the (trial) to advise his client or protect his rights".

The court in Schaber vs. Maxwell, 348 F. 2d 664 (669), quoted Ellis vs. United States, 356 U.S. 674, in which it was held "that representation in the role of an advocate rather than that of amicus curiae is required".

In this case counsel was retained solely for the purpose of the probation and sentencing hearing on this particular date. The appellant in fact received nothing whatsoever in the way of representation on his behalf. The portion of the transcript as quoted was not taken out of context for a further reading therefrom shows that appellant who was unlearned in the law; having been virtually abandoned was compelled to address the court himself. This attempt on the part of the appellant to do so in lay terms only served to irritate the court. Certainly the lack of advocacy as occured in this instance, is so blatent and apparent on its face as causes one to wonder whether the appearance of appellants "counsel" was not in fact on behalf of the prosecution.

VIII

THE AMENDMENT OF THE INFORMATION TO CHARGE AN OFFENSE NOT SHOWN TO EXIST EITHER BY INFORMATION OR INDICTMENT AT THE TIME OF ARRAIGNMENT IN SUPERIOR COURT WAS IN DEROGATION OF APPELLANTS CONSTITUTIONAL RIGHTS.

In Schnautz vs. U.S., 263 F. 2d 825, the court said that the purpose of an indictment is to inform accused of offense with which he is charged so as to permit him to make his defense, and, if subsequently charged with same offense, to permit him to plead double jeopardy.

In U.S. vs. Schneiderman, 102 F. Supp. 87, the court said one of the purposes of an indictment is to inform the court of facts alleged, so it may decide whether they are sufficient in law to support conviction, if one should be had.

In U.S. vs. McCue, 160 F. Supp. 595, the court held there must be a formal and sufficient accusation against defendant who cannot be convicted without such an accusation even if he voluntarily submits himself to courts jurisdiction.

In Frye vs. Settle, 168 F. Supp. 7, the court held that there can be no conviction or punishment of a crime without a formal and sufficient accusation.

In Sanders vs. Buckhoe, 346 F 2d 558, the court held that a defendant may be charged under an information in lieu of an indictment.

In Russell vs. United States 369 U.S. 749, the court held an indictment may not be amended except by re-submission to the grand jury, unless charge is merely a matter of form.

In Crosby vs. U.S., 339 F 2d 743, the court held that an indictment may not be judicially amended even with defendants consent.

In U.S. vs. Manos, 340 F 2d 534, the court held that an information may be amended so that the allegation charged will conform with the evidence as produced.

It is apparent from these cases that the constitutional protection afforded the accused is to assure the existence of probable cause as to the commission of a particular offense to have to stand trial.

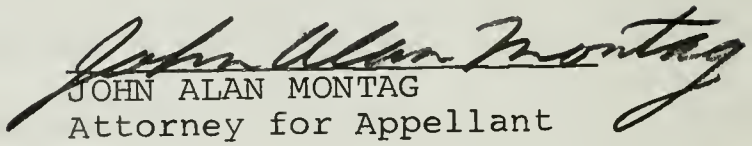
This protection is afforded by both an indictment and information. Nowhere in the information filed at the conclusion of the preliminary hearing is there any indication that there was violation of H. & S. 11,501. There was no evidence presented to a grand jury nor placed before a magistrate. At a preliminary hearing the appellant would have had the opportunity to cross examine witness and submit a defense. Additionally the filing of this count diminished the possibility of obtaining an acquittal on the original charge. It would appear the plea of guilty here was improperly accepted and that any judgments pursuant thereto would be void. It is ludicrous for respondent to argue that appellant was not prejudiced.

CONCLUSION

WHEREFORE, it is respectfully urged that the Order of the court below be reversed in conformity with the applicable decisions herein cited and that the appellant be granted the relief prayed for in his petition for the writ of habeas corpus, and what other relief this Honorable Court may

believe is fair and just under the foregoing circumstances.

Respectfully submitted,



JOHN ALAN MONTAG
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John Alan Montag

JOHN ALAN MONTAG
Attorney for Appellant

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding;

That my business address is 215 West Fifth Street, Los Angeles, California 90013, that on September , 1967, I served the within APPELLANT'S OPENING BRIEF (Fisherman v. Achuff - No. 21598) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, U. S. District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

Thomas C. Lynch, Attorney General
State of California
600 State Building
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September , 1967, at Los Angeles, California.

_____
Signature

Orig. & 20 copies to: United States Court of Appeals
For the Ninth Circuit
United States Courthouse and Post Office Bldg.
7th & Mission Sts., San Francisco, Calif.